No. 2679

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

F. R. BRENNEMAN, U. S. Marshal,
and
JAMES M. MILLSAP, Deputy U. S. Marshal,
Plaintiffs in Error.

vs.

H. M. FAGERBERG,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE DISTRICT COURT,
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

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STATEMENT OF THE CASE.

In this brief the plaintiffs in error will be referred to as the defendants, and the defendant in error as the plaintiff, as in the court below.

As stated by the defendants, this is an action to recover certain real and personal property seized under an attachment in an action to which the plaintiff was not a party, and damages for the attachment which is alleged to be wrongful. The facts are as follows: On the second day of August, 1914, the defendant Millsap, a Deputy United States Marshal,

appointed by and acting under defendant Brenneman, who is United States Marshal for the Third Judicial Division of Alaska, received for execution a writ of attachment in a case in the court below in which Carstens Packing Company, a Corporation, was plaintiff and J. A. Fagerberg was defendat, and in which the plaintiff sought to recover of defendant a judgment in the sum of more than $6,700.00. About one-third of this sum was on a judgment recovered by the Carstens Packing Company against J. A. Fagerberg in the Superior Court of King County, Washington, and for the remainder for sales of goods, wares and merchandise and for money advanced. The complaint in this action appears on page 407 of the record, and its outline is thus early stated because it is so material as to necessitate its being borne in mind at every stage of the argument.

Defendant Millsap executed this writ of attachment on the 2nd day of August, 1914, by attaching a merchandise store of J. A. Fagerberg's. On the 3rd and 4th days of the same month he attached other of the property of J. A. Fagerberg, all of such property so attached being of the value of about $5,800.00 (R. 183-184). Later, on the 6th day of August, 1914, Millsap, acting under the express instructions of the plaintiff in that case, Carstens Packing Company, attached a large roadhouse, barns, outbuildings, and five head of horses in the possession of and claimed by the plaintiff H. M. Fagerberg, three of the horses having been purchased by him out of his own funds. Regardless of the claim of the plaintiff, the Deputy

Marshal Millsap, forcibly ejected plaintiff from the roadhouse, and took forcible possession of all of the property. Outside of the return of defendant Millsap to the writ of attachment (R. 236-7) the only record of the actual manner in which the attachment was made appears on page 45-46-47 of the record, as follows:

"Q. When did the next attachment take place?

A. I believe it was on the 8th day of August.

Q. Where were you at the time?

A. I was at the roadhouse working. He came up——

Q. Who did?

A. Millsap and his deputies—he had three deputies with him—and he said he had an attachment for the whole concern, buildings and horses and everything; he said they had to go ahead and serve an attachment. I said, "Do you know what you are doing?" "Yes," he says, "I thoroughly understand what I am doing." "Well," I says, "I won't give up possession, you will have to put me out." "Well," he says, "if that is necessary, I will do that," and I says (43-26) "Go ahead and do it," and he took me by the shoulders and led me out. I told him, also, about the bill of sale and his deputies so they could see what they were doing exactly and they knew what they were doing at the time.

Q. Where were you at the time?

A. I was in the roadhouse.

Q. He put you outside the door?

A. He put me outside the door, yes, sir.

Q. Did you tell him that that property was yours?

A. I told him they belonged to me.

Q. Where were they at that time?

A. They came in that evening; took them down to Breedman's barn.

Q. Did you tell him the horses belonged to you?

A. I did.

Q. In whose possession was all this property at the time the attachment was made?

A. The possession of the property of the roadhouse, that was in my possession; of course, I don't claim any of the stock of goods that were shipped in there by my brother or Mr. Carstens.

Q. What about the horses?

A. I claim the horses; the horses were mine.

Q. Were they in your possession at the time attachment was made?

A. They were; yes."

This is the testimony of the plaintiff but it stands absolutely undisputed in the record, and there is no doubt that the attachment was made in exactly the manner described. It was to recover the possession of all this property, or its value, and damages for the wrongful attachment, this this action was taken.

Defendants' first answer admitted that the property was in the custody of the plaintiff on August 6, 1915, the date of the attachment, but denied that he had any right to the possession thereof except as the agent or bailee for J. A. Fagerberg, the defendant named in the writ of attachment under which the property was seized. Later an amended answer was filed in which the defendant alleged that the plaintiff and J. A. Fagerberg were general partenrs, but that at the time of the attachment and of their first answer this fact was not known to them. During the trial the answer was further amended so as to read

as it now appears in the record on page 5, *et seq.* It is only fair to state at this time that all of these answers were verified by defendant Brememan, in Alaska, and were prepared by attorneys in Alaska upon information furnished by the attorneys of the Carstens Packing Company, in Seattle. These amended answers sought to justify the attachment under the theory that the plaintiff and J. A. Fagerberg were at all times partners, and therefore, that all of such property could be lawfully attached for debts owing by such partnership, or by either partner individually.

It may be well at this time to recite something of the antecedent history of the Fagerbergs and Carstens Packing Company and its officers. Previous to the year 1907, the Nizina Trading Company, owned and controlled by the Carstens Packing Company and its President, Thomas Carstens, and one Herman Meyer, had established a store and had been doing business on Chititu Creek in the Nizina mining district. In the spring or early summer of 1907, the Nizina Trading Company gave a bill of sale to J. A. Fagerberg, for all the property and J. A. Fagerberg employed his brother, the plaintiff here, at a salary of $1,500.00 per year, to take charge of the store Mr. Prater, an officer of the Carstens Packing Company, states that this change was made for the purpose of J. A. Fagerberg's operating the store, and so as to change the name of the store in the eyes of the public (R. 286-287). H. M. Fagerberg remained in actual charge of the store until the fall of 1910, and from that time on it was run by several different persons

at intervals, and was closed for a part of the time. During the winter of 1910-11 a store and roadhouse were erected at Blackburn, near the terminus of the Copper River & Northwestern Railway, by J. A. Fagerberg, but both of the brothers were actually engaged in working thereon. This place was at first conducted by J. A. Fagerberg but was leased to one S. O. Breedman on the 16th of November, 1912, at $200.00 per month, and remained in possession of Breedman until about the 1st of March, 1914. J. A. Fagerberg left Alaska in November, 1912, and in June, 1913, in the City of Seattle, executed to his brother H. M. Fagerberg, the plaintiff, a deed and bill of sale, conveying to his brother all of his property in Alaska, including the Blackburn roadhouse, horses, and all other personal property used in connection therewith in satisfaction of H. M. Fagerberg's claim against him for wages from 1907 until the date of the transfer, and the deed and bill of sale was immediately placed of record in the proper recording district. In February, 1914, J. A. Fagerberg returned to Alaska, and on March 24th leased from the plaintiff all of the property in question, under a contract to pay to the plaintiff $200.00 per month for the Blackburn roadhouse and store, $25.00 per month for the Chititu store, and $2.00 per day apiece for ten head of horses owned by the plaintiff. This agreement was by its terms to expire September 23rd, but the plaintiff testified that the agreement really was entered into on March 4, though not reduced to writing until March 23, and was to expire on September 4 (R. 145). But between the 2nd and the 6th day of

August, 1914, all of the property claimed by both H. M. Fagerberg and J. A. Fagerberg was attached under a writ of attachment in the action of Carstens Packing Company against J. A. Fagerberg, as before recited.

The testimony on the question of partnership was conflicting. Carstens testified in one place that J. A. Fagerberg told him of a partnership existing between himself and his brother. Prater "understood" there was a partnership. Both J. A. and H. M. Fagerberg denied that they were partners, though they might have permitted themselves to be known as such.

ARGUMENT.

Since the defendants have chosen to consider all of the assignments of error together, we shall do the same, and content ourselves with argument upon the two main questions on which they have based their assignments of error, viz., the question of partnership between J. A. and H. M. Fagerberg, and the question of damages found in favor of the plaintiff in the sum of $4725.00 and reduced by the court to $3,000.00, on account of the wrongful attachment. We shall later advert briefly to each assignment of error separately.

Counsel for the plaintiff are still somewhat at a loss to understand, either, how an action can be maintained against partners upon a joinder of individual and firm obligations, or, how partnership property

can be validly levied upon, as was attempted in this case under the theory of defendants, upon a writ of attachment issued in an action against one partner, for the firm's, and for such partner's individual obligations joined. We have always supposed it a principle of elementary law that partnership obligations are joint, and not joint and several, in the absence of an express statute, and that an action against one partner for the firm obligations cannot withstand a plea in abatement. The leading case on the subject is *Mason vs. Eldred* 73 U. S. 231, where the question is thoroughly discussed, and the doctrine announced therein is so well settled that we shall not quote any of the language to this Court.

But under the theory on which this case was tried that question is not very material, except as showing the desire of the Carstens Packing Company to grab everything in sight regardless of ownership, for the plaintiff denies that he was at any time a partner of any kind of J. A. Fagerberg, and alleges that the property for which he brought this action was his individual property to which J. A. Fagerberg had no manner of claim or interest at the date of the attachment. Therefore, the first question to be determined is whether the verdict of the jury and its special finding that the plaintiff and J. A. Fagerberg were never partners is based upon sufficient evidence. On this question the only direct and positive testimony is that of the plaintiff and J. A. Fagerberg, and each denies in positive terms that any such partnership existed at any time.

In this connection, it was proven, and not denied

by the plaintiff, that the plaintiff permitted himself to be held out as a partner of J. A. Fagerberg, by means of billheads containing the inscription "Fagerberg Brothers," and otherwise. And we fully recognize the rule that, where one is not actually a member of a partnership, but holds himself out, or permits himself to be held out as such, he is estopped to deny the partnership as to one who advances credit to the firm on the strength of the supposed relation, or to one who deals with such supposed firm with no knowledge that such person is in reality a partner. So in this case if Carstens Packing Company dealt with J. A. and H. M. Fagerberg, believing that they were partners and that their property was partnership property, then it matters not if they really were not partners. Each is estopped to deny it by his own conduct, whether intended or the result of carelessness. But this doctrine of estoppel does not extend to one who knows the real relations of the parties, and knows that they are in reality not partners, although for convenience, or through carelessness, one permits himself to be held out as a partner of another. There is no reason then to invoke the doctrine of estoppel, as no one is deceived by such holding out of the individual as a partner. Counsel for the defendants did not deny this proposition of law in the court below, but on page 4 of their brief they state that it raises a quasi-estoppel. That it does not raise an estoppel of any kind is amply proved by the following case:

Thompson vs. First National Bank of Toledo,
111 U. S. 529-28 L. Ed. 507,

in which the Court said:

"The Court was requested to instruct the jury that if Thompson was not in fact a member of the partnership, the plaintiff could not recover against him, unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transactions with the partnership. The Court declined to give this instruction; and instead thereof instructed the jury, in substance, that if Thompson permitted himself to be held out to the world as a partner, by advertisements and otherwise, as shown by the evidence, and to be introduced to other persons as a partner, the plaintiff was entitled to the benefit of the fact that he was so held out, and he was estopped to deny his liability as a partner, although the plaintiff did not know that he was so held out and did not rely on him for the payment of the plaintiff's debt or give credit to him, in whole or in part.

This Court is of the opinion that the Circuit Court erred, in the instructions to the jury and in the refusal to give the instructions requested.

A per son who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits and is sought to be charged for its debts because of having held himself out or permitted himself to be held out. as a partner, cannot be made liable upon contracts of the partnership, except with those who have contracted with the partnership upon the faith of such holding out. In such case, the only ground of charging him as a partner is, that by his conduct in holding himself out as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partner-

ship. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact and whom he never understood or supposed to be a partner, at the time of dealing with and giving credit to the partnership.

There may be cases in which the holding out has been public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel *in pais* a question of fact for the jury, and not of law for the Court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of law is always the same; that one who had no knowledge or belief that the defendant was held out as a partner and did nothing on the faith of such knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact."

In 30 Cyc. 394, the rule is stated clearly:

"But the rule now generally recognized is that, although one holds himself out or permits himself to be held out as the partner of another that does not make him so in fact or render him liable as such, except as to those who are misled such holding out and who have extended credit on the strength of the supposed relation."

This doctrine is universally recognized and has been announced in substantially the same language in the following cases:

Downie vs. Savage (Wash.), 129 Pac. 1096.

Bowen vs. Epperson (Mo.), 118 S. W. 529.
Steele vs. Michigan Buggy Co. (Ind.), 95 N. E., 435.
Webster vs. Clark (Fla.), 16 So., 601.
Seabury vs. Bolles (N. J.), 16 Atl., 54.

and a host of others.

Now let us see what evidence there is in the record as to the partnership or absence of a partnership. The plaintiff positively denies it. Near the end of his cross examination appears the following question and answer:

> "Q. You stand then on your proposition, that at no time you were a partner of Al. Fagerberg?
> A. I certainly do." (R. 140.)

and the whole record of the testimony of both the plaintiff and J. A. Fagerberg is filled with skillful endeavors on the part of the counsel for the defendants to wring from them an admission that they were partners, but with no success. (R. 194-195.)

But there is in the record (Page 34) a lease of the whole Blackburn property to S. O. Breedman, and attached to it an assignment of the rents to S. Blum & Company, to be applied on the mortgage held by S. Blum & Company on the property in question. It is dated the 16th day of November, 1912, and is executed by J. A. Fagerberg alone. Therefore on the question of the general knowledge of a partnership, or rather, on the knowledge by the persons with whom they deal of the real relations of J. A. Fagerberg and H. M. Fagerberg, this instrument is almost conclusive. It shows positively that the men with whom J. A. Fagerberg did business were aware of

the real relations of himself and H. M. Fagerberg and goes far to negative the theory of the defendants that they were partners. At that time, according to the testimony of the plaintiff there was still about $2,600.00 due to S. Blum & Company on the mortgage which it held on the property. It is true that the plaintiff signed the mortgage to S. Blum & Company but he testified, and his testimony is not contradicted although the defendants might have called as a witness either Mr. Blum or Mr. Brock, either of whom would have been free from a suspicion of bias, that he signed the mortgage at the express request of Mr. Brock, who was the agent of S. Blum & Company (R. 194). This was before the execution of the lease, and apparently at that later date, both S. Blum & Company, the mortgagee under the mortgage, and S. O. Breedman, the lessee under the lease, were satisfied with a lease from J. A. Fagerberg, recognizing him as the sole owner of the property, and we may justly conclude that business men in transactions of the importance of this kind and involving such considerable amounts of money would be sure to have all parties claiming any interest in the property sign an instrument of this character.

Another piece of evidence showing that there was no partnership are the notes given by Victor Olson to J. A. Fagerberg, and not to the alleged firm of "Fagerberg Bros.", for goods sold to Olson out of the Chititu store. Three promissory notes given to J. A. Fagerberg by Olson on this account were introduced in evidence (R. 238), but they were omitted

from the record for the sake of brevity by stipulation as shown on page 438 thereof, as follows:

> "It is agreed that Plaintiff's Exhibit 'G' consists of three promissory notes given by Victor Olson, payable to J. A. Fagerberg, dated July 8, 1909, for the aggregate sum of $719.20, due in 120 days, six months and one year respectively, and that this statement be incorporated in the bill of exceptions in lieu of said exhibit."

Now let us see what the knowledge of the Carstens Packing Company was as to the real relations of H. M. and J. A. Fagerberg. Carstens testified that he had been informed by J. A. Fagerberg himself that the two brothers were partners in their business in Alaska. Now, if the Carstens Packing Company, or Thomas Carstens, had such full and absolute knowledge at all times that the plaintiff and H. M. Fagerberg were partners, it is strange that they did not impart some of such information to their attorneys. Mr. Ritchie, one of the attorneys for the Company in its suit against J. A. Fagerberg, and one of the attorneys for the defendants here, explains how the mistake came to be made (R. 246-256). We do not doubt Mr. Ritchie's testimony, and he testifies on page 255 of the record, that it is his opinion that the answer was drawn by Mr. Thomas R. Lyons, one of the attorneys for the defendants, after consultation with Mr. C. F. Wilt, another of the attorneys, and both attorneys for Carstens Packing Company. Mr. Carstens (page 331 of the record) testifies that Mr. Wilt has been the attorney for Carstens Packing Company for two years, and that being such attorney

is his only business. Mr. Ritchie believes that the first amended answer was drawn by Mr. Lyons after consultation with Mr. Wilt. It appears from the record that Mr. Wilt was in Alaska in the year 1914, shortly before or at the time the suit against J. A. Fagerberg was started (R. 331). It is, therefore, strange that Mr. Wilt should state in an amended answer prepared under his direction that the Carstens Packing Company (the real defendant here), did not know at the time of the institution of the suit against J. A. Fagerberg that he and H. M. Fagerberg were general partners. We call the Court's attention to the following lines from the fourth paragraph of the amended answer of defendants, as follows:

"That said action of the Carstens Packing Com-
" pany against J. A. Fagerburg was filed by E. E.
" Ritchie, one of the attorneys for plaintiff therein,
" without full information regarding the same from
" said Carstens Packing Company; that said Ritchie
" drew and verified the complaint upon the facts as
" they had been hurriedly communicated to him, and
" he was not aware that H. M. Fagerburg was a
" partner of J. A. Fagerberg in all dealings of said
" J. A. Fagerberg with the Carstens Packing Com-
" pany; that when the amended answer was filed by
" said Ritchie in this cause, setting up that said
" Carstens Packing Company had learned since the
" filing of said company's case against J. A. Fager-
" berg that J. A. Fagerberg and H. M. Fagerberg
" were partners the same *was done on information*
" *written to said Ritchie by a Seattle attorney of said*
" *Carstens Packing Company.*" (Italics are ours.)

It is true that several answers do not appear word for word in the transcript, they were purposely omitted so as to make a smaller record. The sub-

stance appears, however, from the fourth paragraph of the amended answer a part of which is quoted above, and is found on pages 8 and 9 of the record. In Mr. Ritchie's cross-examination the matter is gone into quite extensively, and it is clear from that just what was pleaded in these different answers, as follows: (R. 254) (R. 277-278).

"Q. Who drew the original amended answer which was filed in the case now on trial?

A. I did.

Q. In the first answer you claim that the property is the property of the firm of Fagerberg Brothers, comprising J. A. Fagerberg and H. M. Fagerberg, do you not?

A. That is true.

Q. Now, the purposes of this cross-examination go further than the testimony just offered in reply to the allegations in that amended answer that Judge Lyons of Seattle sent up to you. Did he not have an allegation in that answer that he did not know of the alleged co-partnership between the Fagerberg Brothers at the time of bringing the suit of the Carstens Packing Company against J. A. Fagerberg?

A. I am not sure but there was probably something like that—I modified the answer in several particulars." (Testimony of E. E. Ritchie for defendant—Recalled). (R. 277-278).

E. E. RITCHIE—(Recalled) (By JUDGE LYONS)

"Q. When you left the witness stand yesterday the understanding was that you were to produce any written instructions you had from either Mr. Wilt or Mr. Bunnell concerning the bringing of this suit entitled Carstens Packing Compnay against J. A. Fagerberg. I will ask you if you have any of those letters and if so, produce them.

A. Yes, I found a letter written to me by

Mr. Bunnel at Cordova. This is a long letter of five or six pages and there are some private matters in it, strictly confidential, on our side of the case, and on every page and I couldn't introduce that letter.

MR. DONOHOE. We have no desire that any part of the letter be introduced but if the letter is introduced, we want a chance to see that it covers every portion of this suit.

THE COURT. What is the purpose of the letter at all, what difference does it make?

MR. DONOHOE. I don't know that it makes any material difference, but the question came up; there is a contradiction in the two answers filed by the defendant in this case. In the first instance they alleged that when this property was attached, it was in the possession of J. A. Fagerberg, and H. M. Fagerberg if in possession of it was there as the agent or employe of J. A. Fagerberg; in the second amended answer they allege it was partnership property and that the Carstens Packing Company had no knowledge of the existence of the alleged co-partnership between J. A. and H. M. Fagerberg until after they filed the suit and had the writ of attachment issued. Now, Mr. Ritchie went on the stand yesterday and explained how that allegation came in that amended answer and said, I believe, that he was instructed by Mr. Wilt to (250-232) bring the suit against Fagerberg Brothers, but contrary to those instructions, he thought it safer to bring it against J. A. Fagerberg and that accounted for the way the suit was brought."

Also the following from the testimony of Thomas Carstens: (R. 332).

"Q. I see the Carstens Packing Company has filed an amendment to its answer in the case of H. M. Fagerberg vs. the United States Mar-

shal of the Third Division, in substance as follows: That at the time of the commencement of said action of Carstens Packing Company vs. J. A. Fagerberg, the plaintiff in said action was not aware that the plaintiff herein, H. M. Fagerberg and J. A. Fagerberg, were partners. How do you explain that in your answer, that you did not know they were partners up to July 31, 1914?

A. I know I told Mr. Wilt to bring suit against the brothers, as I stated before. I don't know why he sued J. A. alone. Mr. Wilt is not in town, he is in the East, and I did not know until today that the suit was brought in the name of J. A. Fagerberg alone."

It seems quite strange for the counsel for the plaintiff that Mr. Wilt, whose sole business was to look after the affairs of the Carstens Packing Company and who was on the ground shortly before bringing the suit against J. A. Fagerberg, should instruct Mr. Lyons to draw an answer containing the allegation that at the date of the bringing of the suit against J. A. Fagerberg, and at the date of the attachment in question, the Carstens Packing Company, of which he was an authorized agent, did not know of any alleged partnership relations existing between the plaintiff and J. A. Fagerberg. If he had any such information he kept it to himself and instructed Mr. Ritchie to draw an amended answer alleging want of knowledge of any partnership. Counsel for the defendants express amazement at the ingenuousness and trustfulness and general simplicity of the plaintiff Fagerberg, but they fail to express any surprise as to the lack of information of their attorney, Mr. Wilt, who undoubtedly knew all of the facts of the case as witness the following testimony of

the plaintiff (R. 243).

(Testimony of H. M. Fagerberg for Plaintiff—Recalled)

"H. M. FAGERBERG, recalled for further redirect examination.

(Questions by Mr. Dimond.)

Q. You stated either yesterday or this morning that you had a short conversation or several short conversations, I have forgotten which, with Mr. C. F. Wilt, the attorney for the Carstens Packing Company in July, I think it was, 1914, while he was at Blackburn?

A. I did, yes sir.

Q. Will you state whether or not you told him that you owned the property for which this suit is brought?

A. I certainly did.

Q. Did you show him the bill of sale for that property?

A. I did.

THE COURT. When was this, what date.

A. July, 1914."

For a thorough understanding of the knowledge of the Carstens Packing Company of the relations of the plaintiff and J. A. Fagerberg, let us turn to the testimony of Thomas Carstens, the President of the Company. He testifies that he knew of the partnership at all times, but that he did all business with J. A. Fagerberg. He carried the account in the name of J. A. Fagerberg, he sued J. A. Fagerberg alone in Seattle and obtained judgment against him there and that he always looked to J. A. Fagerberg alone for payment (R. 330-1) (R. 333).

"Q. During all these years you knew that J. A. Fagerberg and H. M. Fagerberg were partners in Alaska?

A. From what J. A. told me.

Q. Now, notwithstanding that, you carried the account in the name of J. A. Fagerberg?

A. Yes, sir.

Q. Notwithstanding that you sued J. A. Fagerberg for an indebtedness that he owed, and secured a judgment?

A. Yes, sir.

Q. And he did not include H. M. Fagerberg?

A. No.

Q. And you looked personally to J. A. for payment?

A. Yes, sir.

Q. And did not look to Fagerberg Brothers, in advancing this credit, but, knowing that Harry Fagerberg was connected with J. A. Fagerberg, the bills were made out in the name of J. A. Fagerberg, and you did not look to H. M. Fagerberg or the alleged (294-276) partnership for payment but to J. A. Fagerberg?

A. To J. A. Fagerberg.

* * * * * * *

Q. Did you not know that J. A. Fagerberg had executed a bill of sale to H. M. Fagerberg the year previous?

A. I am not sure that J. A. made a bill of sale to his brother of the Chititu store or his business.

Q. Do you not remember that in the spring of 1913 J. A. Fagerberg wanted to make a bill of sale, of what he termed the whole works, to Carstens Packing Company, or to you?

A. Yes.

Q. Was not the condition of making such a bill of sale that the Carstens Packing Company was to pay the back salary of $4,500.00 to H. M. Fagerberg? (296-278).

A. Not that I know of.

Q. What were the conditions that J. A. Fagerberg offered to make that bill of sale for?

A. I do not recollect. I do remember that there was some consideration he wanted to make his brother, in order to get him to turn it all back.

Q. But when he offered to deed it to you or the Carstens Packing Company, what were the conditions?

A. I don't remember just now, but I remember there was an amount he wanted to pay his brother, in order to leave his brother out of the transaction and turn the property over to me.

Q. Now, he was ready to turn the property over to you if you would pay his brother a certain amount of money, is that right?

A. I believe that is it.

Q. And you refused?

A. I believe I did.

Q. And that is the reason he did not make the bill of sale at that time?

A. It was something that came up—I don't remember.

Q. But you remember his making such a demand?

A. I believe there was something like that."

We thus see that at least seven months before the indebtedness on which Carstens sued J. A. Fagerberg was incurred he had full knowledge that all the property was conveyed to the plaintiff.

Now compare this last testimony of Thomas Carstens with that of J. A. Fagerberg of the same incident (R. 169-170-171):

"Q. And at the time of arriving at Seattle did you have any conversation with the officers of the Carstens Packing Company in regard to the claim of H. M. Fagerberg for wages?

A. Yes, sir.

Q. With whom did you have such conversation?

A. W. H. Prater.

Q. Who was he?

A. Secretary and Treasurer for the Carstens Packing Company.

Q. Just state the conversation you had with W. E. Prater in regard to that matter?

A. I told Mr. Prater the trouble I had been having up here and he says, it is the same old story, we have always had that up there—referring back to the old Myers outfit—and I told him what I wanted to do.

Q. What did you tell him you wanted to do in regard to H. M. Fagerberg's account for back wages?

A. I told him I wanted him to take care of that and I would give the Carstens Packing Company—if he would talke care of H. M. Fagerberg's account, H. M. Fagerberg's wages, and the rest of the liabilities, I would give the Carstens Packing Company a transfer of the property, all the property I had control of in Alaska.

Q. Is that the same property that appears in the bill of sale that you did give H. M. Fagerberg in July, 1913?

A. Yes, sir. (157-140.)

Q. What did Mr. Prater say in regard to that?

A. He said he wouldn't have anything to do with it, I could do just as I liked.

Q. Did you have any talk about that time with any other officer of the Carstens Packing Company?

A. No, he wanted me to go over and see Tom Carstens about it.

Q. Where did Tom Carstens live?

A. His office is in Tacoma, the plant.

Q. Did you go and see Tom Carstens about it?

A. I did.

Q. Did you have any conversation with him?

A. I did.

Q. State the conversation you had with Tom Carstens?

A. I told Mr. Carstens the proposition as I told Mr. Prater. I told him, you take care of Harry's back wages and look out for the rest of the creditors and I will give you a transfer of the property and will call it quit.

Q. What did Mr. Carstens say about it?

A. He said, "No, I don't want anything to do with it; we will just take our loss and you can do as you like."

Q. What did you tell him you were going to do with the property then?

A. I told him when I went out that I would give Harry the property."

The Court will note that Mr. Carstens in his direct examination (R. 321) stated that J. A. Fagerberg was willing to turn his property over to the latter as Fagerberg was having trouble with his wife. In his cross-examination above quoted (R. 333) he states that J. A. Fagerberg offered to turn the property over on consideration of his giving something to the plaintiff herein, and this last statement absolutely corresponds with the statement of J. A. Fagerberg, just above quoted, of such conversation, that he was willing to turn the property over to Carstens if the latter would take care of the plaintiff's wage account and of the other creditors, and the answer he quotes of Thomas Carstens under the circumstances has the ring of truth: "No, I don't want anything to do with it; we will just take our loss and you can do as you like. (R 171). Mr. Carstens on his own testimony as well as the testimony of J. A. Fagerberg,

was at that time willing to relinquish all rights rather than have to pay any more money to the plaintiff or any one else. At that time he impliedly admitted the validity of the plaintiff's claim, thus proving that he had no thought of claiming a partnership between J. A. Fagerberg and the plaintiff. It was only a later date, and after the filing of the amended answer in this case, that it occurred to him to claim that the plaintiff and J. A. Fagerberg were general partners, and thus justify his lawless acts in attaching the property of the plaintiff under a writ against J. A. Fagerberg.

Mr. Prater also testifies (R. 307) that J. A. Fagerberg agreed to make a deed and bill of sale of all the property in Alaska to Thomas Carstens to liquidate some old indebtedness, and apparently he does not remember that the conditions on which the property was to be given to Mr. Carstens were that Mr. Carstens was to pay a certain sum to the plaintiff. The sole purpose, according to this witness, and according, likewise, to Mr. Carstens on his direct examination, of the transfer of the property to H. M. Fagerberg was to defeat the creditors of J. A. Fagerberg. It was only on cross-examination that Mr. Carstens remembered the one condition with which he refused to comply was the payment of a certain sum, the amount of which he also fails to remember, to the plaintiff. However, he is quite sure that it was not $4,500.00 (R. 333).

We think there can be little doubt in any fair mind after reading this testimony that in the summer of 1913 the Carstens Packing Company and

Thomas Carstens were willing to pocket their losses in Alaska rather than invest another dollar. That they then and at all times knew J. A. Fagerberg and H. M. Fagerberg were not partners, and that the plaintiff could subject the property of J. A. Fagerberg to his wage account.

Before we pass from the question of the alleged partnership between the plaintiff and J. A. Fagerberg and the knowledge that the Carstens people had of it we desire to call the Court's attention to another piece of mute evidence in the case tending to support the first amended answer of the defendants, wherein they allege that at the time of the attachment of the property and at the time of the bringing of the suit against J. A. Fagerberg in 1914, they had no knowledge that the brothers were partners, and that is the proof of claim filed in the bankruptcy court in the bankruptcy of J. A. Fagerberg (R. 245). It will be noted that in the whole claim there is no mention of a partnership or of any partnership liability. The claim is made against J. A. Fagerberg alone. This was sworn to by Thomas Carstens on the 7th day of October, 1914, a date some considerable time after the time of the attachment. Counsel for the defendants say that since both the Fagerbergs owed the sum therein named, therefore each owed it, and it was no admission concerning the partnership to file a claim in bankruptcy against J. A. Fagerberg alone. It seems strange that Carstens should allege in this claim, if he at all times thought the brothers were partners, that the claim was for goods, wares and

merchandise converted by the bankrupt J. A. Fagerberg to his own use, and make no mention of the alleged partnership. This is in line with his practice of charging everything on his books to J. A. Fagerberg, looking to J. A. Fagerberg alone for payment (R. 330), bringing suit and recovering judgment against J. A. Fagerberg alone in Seattle, bringing suit against the same individual in Alaska, and not against any alleged partnership, and his testimony that the reason J. A. Fagerberg would not make the transfer of the property to him was because he would not put up money to pay the plaintiff his account. So much for the partnership, and the knowledge that the Carstens Packing Company had of it. We think it quite clear from the testimony of the plaintiff and J. A. Fagerberg, from the documentary evidence in the case and from the pleadings and from the admission of Thomas Carstens himself, not only that the plaintiff and his brother were not partners, but that Carstens Packing Company and Thomas Carstens at all times knew that they were not partners, and therefore that no estoppel is raised against plaintiff under the doctrine of *Thompson vs. First National Bank of Toledo, supra,* to deny the partnership.

There is a passage in the testimony of Thomas Carstens which somewhat strains the credulity of counsel for the plaintiff to believe. Mr. Carstens testifies that shortly before J. A. Fagerberg left for Alaska in the spring of 1914, he positively refused to let Fagerberg have any credit of any kind except about $200.00 worth of meats, but that afterwards

Fagerberg drew upon him for $1500.00, which he paid, and that he later advanced about $2800.00 worth of supplies of various kinds, a total of about $4300.00 (R. 327-328). It seems to us much more likely that the story of J. A. Fagerberg is true, that he went to Alaska in the spring of 1914 with a general understanding with Carstens that he was to obtain the property in question from the plaintiff, and that Carstens would stand behind him in his venture, in order to reap the profit then obtainable in the roadhouse and merchandise and general freighting business on account of the reported Shushanna strike (R. 172-3-4).

> "Q. Did you shortly after that have any other or further conversation with Tom Carstens, the President of the Carstens Packing Company?
>
> A. Yes, sir; I did.
>
> Q. When?
>
> A. I was away out of the city, and they started to hunt me up and then they sent for me and I came back from Everett and Prater and myself and Custer went to Tacoma and we had a conversation then and they wanted me to go back to Alaska on account of the Shushanna strike.
>
> Q. Whom did you have the conversation with when you went to Tacoma?
>
> A. Mr. Carstens.
>
> Q. Was Mr. Prater present?
>
> A. Yes, sir.
>
> Q. Did Mr. Carstens state to you at that time why he sent for you?
>
> A. Yes, he stated the Shushanna strike is now on and it looks as if we would be able to do something with that, and I want you to go up there and get the property back from Harry and

see if you can do something with it and get our money back out of it.

Q. Did he state why he thought there was a chance to get the money (159-142)?

A. Because of the Shushanna stampede—he was very much excited about it that time.

Q. When did the news reach Seattle about the Shushanna strike?

A. Along about the 20th of July, I judge, 1913.

Q. Just describe to the jury the location of the Shushanna mining district, with reference to the Blackburn roadhouse—what advantages there are to the roadhouse?

A. The Blackburn roadhouse is situated at the end of the Copper River and Northwestern Railroad. It is a distributing point for the head of the White, Chitina, Nizina, and all the tributary country; it is the natural gateway, the same as Valdez is to the Copper River country; and that was my argument with the company in putting in the Blackburn place.

Q. Then, as I understand you, people going to the Shushanna, get off the Copper River Railroad at Blackburn or McCarthy?

A. Yes, sir.

Q. And it is a case of mushing from there into the Shushanna?

A. Yes, sir.

Q. Now, what kind of a proposition, if any, did Mr. Thomas Carstens make to you in that conversation early in August, 1913, in which he wanted you to come back up here and get Harry Fagerberg to transfer the property back to you or to him?

A. "Well," he says, "You go up there and get the property back and I will give you anything you want." He went so far as to pay my transportation,—"and I will take care of all your back alimony," etc., if I would go and straighten it out; he says, "You are the only one who can straighten it out."

Q. Was anything said in that conversation about H. M. Fagerberg's back wages, or what interest he should have (160-143)?

A. Well, there was nothing definite said at that very time except do the best you can—he always did—and I demanded a letter from him giving me instructions what to do."

Now, on the question of veracity it seems to us that the preponderence of the mute testimony in the case is in the favor of the plaintiff, and it seems more likely that the allegation of the first amended answer of the defendants is true,—that is, that the Carstens Packing Company and its officers did not know at the time of the bringing of the suit against J. A. Fagerberg that he and the plaintiff had ever been held out in any manner as partners, but that afterwards learning of it they deemed it an unparalleled opportunity to take advantage of the ignorance of plaintiff and to take all of the property for which he had labored so many years. Truly, some people can bear with equanimity the misfortunes of their friends.

And right here it may be well to advert for a moment to the general business relations of the Carstens outfit and the plaintiff and J. A. Fagerberg. It appears in the record that an inventory was taken in 1907 of the stock of merchandise belonging to the Old Nizina Trading Company, or to Thomas Carstens, and that the same inventoried, at the prices then charged, about $30,000.00 (R. 137), and a part of the cross-examination of both the plaintiff and J. A. Fagerberg was taken up with the question of what disposition was made of this considerable amount of property. But the plaintiff testified that

these prices were reduced all through about 33 1-3 per cent (R. 142). This would leave about $20,000.00. About $10,000.00 worth of merchandise was actually sold between 1907 and 1910, but of this $10,000.00 a good part consisted of new goods which were taken in by J. A. Fagerberg during these years, as he put in the store between 1907 and 1910 about $6,600.00 worth of merchandise (R. 159-160). A large part of the merchandise was thrown away, having become unsalable with age, particularly the groceries and meats (R. 142-143), and the remainder was still there at the time of the trial of the cause, except for quite a large amount which was given out on grubstakes under the directions and with the approval of Mr. Carstens (R. 162). We think that this testimony shows that this property was fairly used by J. A. Fagerberg for the purposes and disposed in the manner testified to, and that the Carstens Packing Company were like so many others in Alaska, taking great chances of loss in the hope of great profits, and reaped a loss only on account of conditions over which no human being had control.

Defendants also express suprise that all this valuable property was to be sold for $7,000.00 by the plaintiff, a sum less than the rentals for a year, assuming that it could be leased for an entire year at the prices named in the lease of March 23, 1914. In the first place, we deem that the court will take judicial notice that property values in Alaska, except in a very few places, are much more highly speculative than in the United States proper. The plaintiff also

explained why he was willing to take this sum for the property (R. 145).

"Q. At the time you made this lease to him as you have testified, you expected that it would last only a short time?

A. I didn't expect it would last over two months at the very most.

Q. Why was it that this property that was worth about $10,000.00, why were you willing to sell for $7,000.00?

A. I was willing because I wanted to go outside. I had a proposition from my father. He has considerable real estate around Seattle, and he said if I could get a little cash money and come out there, he would back me outside, and I wanted to get out and let Al and Carstens conduct it themselves (R. 145).

* * * * * *

Q. What I am getting at is— you owned this roadhouse and everything in it was a very profitable business, and you owned the horses. and you figured out you could make good money —a good many hundred dollars per month from them—and yet you leased everything to Al Fagerberg and turned in and worked for him for $100.00 per month according to this agreement?

A. Yes, sir.

Q. Was that getting out of the country?

A. No, sir.

Q. Why did you do that?

A. In the first place that was only supposed to run for about a month before the incorporation was to be perfected, and that was to be turned over to them; that was not to be run for any length of time; that was the understanding when I turned that over to him and they were to go ahead and carry this thing, in fact, my brother telegraphed for a man to Carstens and they (88-71) sent him up, but they didn't send the man he wanted; he was to get out and perfect

the organization before I turned it over to him; I was to turn it over to him after the incorporation" (R. 93-94).

Remembering then the speculative value of the property, it is not so strange that the plaintiff would rather feel $7,000.000 in real money in his hands than keep the property with all the labor entailed in making it a paying proposition. Most people do not care to live in Alaska all their lives, even though the living here may be made profitable by means of hard labor.

In all the various ramifications of the business of J. A. Fagerberg, Carstens Packing Company, Thomas Carstens, and such connection as the plaintiff had with them, it is to be borne in mind that the plaintiff and J. A. Fagerberg are brothers, and therefore that the degree of trust imposed by the plaintiff in his older brother is not so surprising in view of such relationship. A confidence which might be suspicious if testified to as existing between others, is the natural and ordinary thing between men bound by such ties of close relationship. Note the following testimony of the plaintiff (R. 139).

Q. Do you wish to be understood as saying, when you had at least (128-111) that amount due you as wages, you turned it over to Al who had never paid you anything but your board, and went to work for him in the logging camp and building a roadhouse, still went to work for him and gave him back the $3,800.00?

A. I looked at it in this light: he came at it in this way and perhaps you can understand things. He says, "I put you in here," at the time we had a kind of a rumpus—"You were broke," he says, "and I put you in here and gave you a chance to make this money, and now" he says,

"when you have made this money and there is a chance to make money—this has been a losing proposition," he says to me—"you draw out, take your money," he says, "and leave me in the lurch with Carstens and the whole thing on my hands—you take your money and go off." When a man comes at you that way, what are you going to do?"

This passage is not only illuminating, but we submit that it bears the stamp of truth on its face. It is entirely characteristic of that class of men, so plentiful in the North, where generosity outruns their reason and whose chief characteristic is a fervent and unfounded expectation of sudden and great riches.

Also note the following from the testimony of J. A. Fagerberg (R. 194).

"Q. Did you concede at that time that the $3,800 was due him?

A. Yes, sir; I conceded that the $3,800 was due him; I concluded the $3,800 was due the boy and I think a little more.

Q. How did you persuade him to give it up to you?

A. I said to him, "I put you in here and I am up against it on the proposition," but I told him the advantages of the thing, and the points of the argument, and I said, "the property is worth it; any time I fall down you have the house here, when I put in the house—you can't lose any way, even if the Carstens Packing Company give you the dirty end of it."

Moreover, it is only reasonable to assume that the plaintiff may well have believed he was safe so long as the property was in existence and close at hand so that it could by proper legal proceedings at any time be subjected to his claim for wages

Counsel for the defendants observe in their brief that it is strange that the plaintiff was willing to work for the Carstens Packing Company for so long a time since, as plaintiff alleges, the name of that Company in Alaska was not good. We call the Court's attention to the testimony of Mr. Prater, the Secretary and Treasurer of the company, who admits (R. 286-287) that the Chititu property was given to J. A. Fagerberg, "Just for the purpose of him "operating the store, and so as to change the name of "the store in the eyes of the public." It is strange that they themselves wanted the name of the business changed.

Counsel for the defendants further advert at some length on the lease to J. A. Fagerberg from H. M. Fagerberg in the month of March, 1914 (R. 40-41-42), as to the fact that the property, at the rate mentioned in the lease would have brought in $9,900 per year. In the first place we call the Court's attention to the fact that of that sum $600.00 per month, or $7,200.00 per year was for the ten head of horses, which left $2,700.00 per year for all the other property, not much more than the sum for which the property was leased to Breedman (R. 34) and it will be noted that the Chititu store was not included in the lease to Breedman. It will be observed that this lease was by its terms to run for six months.

Both J. A. Fagerberg and the plaintiff testified that the best business was in the late summer and fall, Counsel's argument, though extremely plausible on its face, will not, under the facts, bear a searching

analysis. Assuming, as is stated on page 24 of the brief of counsel for the defendants, that there was an agreement to lease property which plaintiff claimed to be worth $10,000.00 for $9,900.00 per year, provided the lease at the figures named in the lease (R. 40-41-42) could have been obtained for the whole year, we must remember that the plaintiff valued the horses taken in the attachment, five of them at $200 per head (R. 49). Assuming that the price mentioned represented the value of the remainder of those ten horses leased to J. A. Fagerberg, then the value of those ten horses would have been $2,000.00. For the use of these horses plaintiff was to receive $2.00 per day per head, or $600.00 per month, and for the six months that these horses were leased to J. A. Fagerberg, at the rate mentioned, they would bring in $3,600.00, something more than their value, but not at all strange in view of the conditions, when, in the midst of a stampede to new gold diggings, horses might be worth any price, and the $2.00 per day charged by the plaintiff was never even questioned as reasonable. We believe that the Court will take, in a manner, judicial notice that the conditions in Alaska are different than in well-settled and old communities, where property values are firmer, and there is less wild speculation. Moreover, as sustaining the reasonableness of the rent value of horses at $2.00 per day the plaintiff testifies that on a previous occasion (R. 123-124) he was obliged to pay $3.00 per day per horse for nine horses for an entire summer and until late in the fall. If this value was not

reasonable, it seems to us that it devolved on the defendants to show its unreasonableness by the testimony of others under no suspicion of bias, but this they never even attempted.

Now, as to the other property: Deducting from the total value of $10,000.00 the sum of $2,000.00, the value of the horses, and we have $8,000.00 remaining, and on this $8,000.00 worth of property the plaintiff was, under the terms of his agreement with J. A. Fagerberg, to receive $225.00 per month, or $2,700.00 per year, surely not an abnormally large income for property valued at $8,000.00, in view of the conditions prevalent in Alaska, and exactly the same rental received for the same property under the lease to Breedman, as the Chititu store was not included in that lease. To show the speculative nature of the value of the property we may cite the testimony of the plaintiff (R. 130) that Breedman's partner, Church, stated that he had cleaned up $10,000.00 on the property during the time it was leased to Breedman between November, 1912, and March, 1914. And it appears by the record that the plaintiff, like most other men owning property of like nature, was always ready to discount the value considerably to get some real money. For instance, in making up the valuations, a price was put upon the Chititu store of $2,000.00, which the plaintiff in the summer of 1914 offered to sell to Carstens for $500.00 (R. 146), stating that he could use that sum to better advantage. Moreover, the plaintiff in making a proposition to sell the property to his brother for

$7,000.00, was undoubtedly influenced by the ties of relationship.

Let us consider the manner in which the attachment of the property in question was actually made. The plaintiff testifies to the manner thereof on pages 45, 46 and 47 of the record, and we have quoted it on pp. 3 and 4 of this brief. This shows clearly that at the time of the attachment the plaintiff was in actual possession of the property claiming the same as his own. and that he was forcibly removed from the roadhouse and all of the property was taken from him by actual force. The marshal, the defendant Millsap. went into the possession of all the property and excluded the plaintiff therefrom. We desire in connection with this undisputed fact to call the Court's attention to the construction put upon our statute on attachment by the Supreme Court in the case *Marks vs. Shoup,* 181 U. S. 562, 45 L. Ed. 1002.

That was likewise a suit for damages on account of a wrongful attachment, the goods being at the time of the attachment in the possession of a person claiming them as his own, and who was not the defendant named in the writ of attachment. In that case as in this the marshal, Shoup, forcibly ejected such alleged owner from the building and took possession of all the property, and when suit was brought against him, alleged that the goods were in reality the property of the defendant named in the writ, and that the transfer to the claimant at the date of attachment was in fraud of creditors. The Supreme Court held this to be no defense, stating that under the attach-

ment statute in Alaska (identical with the statute now in force), if property is in the possession of a third person who claims it as his own, the only legal method of attaching it is by serving on such alleged owner a writ of garnishment, and that if the marshal takes forcible possession of the property he is a trespasser. In other words, the marshal has no right to determine for himself who is the lawful owner of the property, but under the garnishment proceedings the claimant has a chance to appear in court and establish his title.

Now, we cite this for two reasons: First, to show to the Court that the actions of the defendants in this case were absolutely contrary to the law, and any plea of partnership, or alleged partnership, was no defense in any event to our cause of action. Second, to call the court's attention again to the fact that the question of partnership has been decided by the jury in explicit terms. The Court will note that at the close of the trial the plaintiff moved for a directed verdict in his favor (R. 392) on the ground just mentioned—that the claim by the defendant that the plaintiff and J. A. Fagerberg were partners and that the property attached was partnership property—did not constitute any defense, basing his motion on the case of *Marks vs. Shoup, supra.* The record shows that after argument the motion was overruled. In this respect the transcript is incorrect, as counsel for the plaintiff who tried the case remember very clearly that they withdrew the motion in order to have the question of partnership, as well as all the other ques-

tions in the case, determined in the one action, and for that reason agreed in submitting to the jury, under stipulation with the defendants, a request for special findings on the question of partnership. The jury found as shown by the following (R. 413):

I.

"Was H. M. Fagerberg on the 6th day of August, 1914, the sole and lawful owner of the property described in the amended complaint, that is, the Blackburn roadhouse, furniture and equipment, the barns and outbuildings, and the horses, harnesses, sleds, etc., as set forth in Plaintiff's Exhibit "A," attached to the amended complaint?

He was.

II.

Was there a partnership existing between H. M. Fagerberg and J. A. Fagerberg at any time previous to the 6th day of August, 1914?

There was not.

III.

Should you find that there was such a partnership state when it began and when it terminated (370).

Dated at Valdez, Alaska, this 13th day of May, 1915.

GEORGE LACY,
Foreman "

We believe that the counsel for the defendants will admit that we withdrew the motion for a directed verdict and that it was not over-ruled as stated in the record. If they will not, of course, the record must stand as it is and be taken for true, but in that event we submit that, under the decision of *Marks vs.*

Shoup, the ruling of the Court in this respect constituted reversible error. At all events it is a commentary on the general lawlessness of the Carstens Packing Company, for the Court will remember that according to the testimony of J. H. D. Bouse, the chief Deputy Marshal (R. 241-242) his office received instruction from the attorneys for Carstens Packing Company either to make the attachment, or to hold the property if it had already been attached, regardless of the claims of the plaintiff.

There remains now, of the questions seriously argued by the defendants, only the matter of damages on account of the attachment, the counsel for the defendants claiming that they should not stand as having been based on testimony of speculative profits. We have noted the contention of counsel on Page 34 of their brief, where they state that, as asserted at the trial of the case, the plaintiff is entitled to no damages because had the attachment not been made he would have gone on working for $100.00 per month,—for how long a time counsel does not state,—and that, therefore, the only thing the plaintiff lost by the attachment was the chance of working for $100.00 per month. In view of the undisputed facts, this is manifestly absurd. On the 2nd, 3rd and 4th days of August, 1914, the Marshal attached a large quantity of property belonging to J. A. Fagerberg of the value of $5,800.00 (R. 182-184) and to which the plaintiff made no sort of claim.

After this first attachment of property that was undisputably J. A. Fagerberg's, that individual

turned over and delivered to the plaintiff all of the property which he theretofore had been holding under the lease of March 24 (R. 40-41-42), and the plaintiff held it until August 6, 1914, when it was forcibly taken away from him by the United States Marshal under the writ of attachment against J. A. Fagerberg. Now, we are not suing on account of the first attachment of J. A. Fagerberg's property, and have never laid claim to it. The only attachment of which we complain is the attachment of August 6, when all of the property claimed by the plaintiff was levied upon. Therefore, before the date of the attachment of which we complain the plaintiff was in undisputed possession of the property for which we sue, and was running the business as his own, and there is nothing in the record to show that, had it not been for the attachment of August 6, he would not have continued to hold and use it himself and make such profits, or incur such losses, as might accrue therefrom, and if he could prove any profits prevented he was certainly entitled to damages in that amount.

As to the amount of damages to which the plaintiff was entitled, it will be noted that the jury brought in a verdict for $4725.00, which was reduced by the Court to $3000.00, on the motion for a new trial, and the plaintiff consented in open court to such reduction. The order of the Court in this respect is as follows (R. 417-418):

> "The motion of defendants for a new trial in the above-entitled cause came on regularly for hearing this 19th day of May, 1915, the plaintiff

being represented by his attorneys, Donohoe & Dimond, and the defendants by their attorneys, Lyons & Ritchie, and the Court having heard the said motion, and the arguments of counsel for the respective parties, and being fully advised in the premises, announced that in the opinion of the Court, the damages fixed by the jury in the verdict of four thousand seven hundred and twenty-five dollars for the wrongful taking and detention of the property described in plaintiff's amended complaint were excessive, and that in the opinion of the Court the sum of three thousand dollars would be just and equitable as such damages, whereupon, plaintiff announced in open court that he was willing to accept said sum of three thousand dollars as such damages.

Now, Therefore, It Is Ordered, That said motion for a new trial be and the same is hereby denied; and it is further ordered that the verdict of the jury as to damages for the wrongful taking and detention of the property described in the amended complaint in this action, be and the same is hereby modified by reducing the amount thereof from four thousand seven hundred twenty-five dollars to the sum of three thousand dollars, and that judgment be entered for plaintiff and against defendants and each of them accordingly. To which order of the Court the defendants then and there excepted (375).

Done in open court at Valdez, Alaska, this 19th day of May, 1915.

"Fred M. Brown, *Judge.*"

So then we must consider not whether the verdict of the jury as entered for $4,725.00, but whether the judgment of the Court for $3,000.00, as such damages, was justified by the evidence and if it be found that the judgment of $3,000.00 is sustained by the evidence then this Court would not be justified in reversing the

judgment, even if testimony was improperly admitted as to damages which alone would support the verdict of the jury in the larger sum. And we insist that there is plenty of material, competent and proper evidence in the record to justify that judgment.

In the first place, it is clearly established that the Blackburn property, exclusive of the horses, sleds and harness and certain other personal equipment, was leased to Breedman under a three-year contract for a monthly rental of $200.00 per month, from and after November 20, 1912 (R. 34 *et seq.*), which lease, by agreement of the parties, was cancelled on or about March 1, 1914 (R. 38), a period embracing two winter seasons, when, by the testimony of the plaintiff and J. A. Fagerberg, and undisputed, the chances of making profits were smallest.

On March 24, 1914, the plaintiff leased the same property and some few sleds, harnesses and wagons to J. A. Fagerberg for $200.00 per month for a period of six months (R. 41). The Court will note that the Chititu store was not included in the lease to Breedman or the lease to J. A. Fagerberg, and that it is not claimed by the plaintiff in this action, nor is it in any way involved here, and therefore may be disregarded. Here, then, was property that at the date of attachment, had been under lease since November 1, 1912, at the monthly rental of $200.00 and we believe that this fact comes as close as any kind of testimony on earth could come to establishing the reasonable value of the property to plaintiff, as the reasonable profits prevented on account of the attachment.

Now, it appears from the record, both by the testimony of the plaintiff and by the return of the defendant Millsap to the writ of attachment, that the property in question was attached on August 6, 1914, and that the plaintiff never regained possession of any of the property previous to the date of the trial. The verdict of the jury at the trial was rendered on May 13, 1915, and judgment was rendered May 21, 1915, nine months and fifteen days after the date of the attachment. Calculating the usable value of the property at $200.00 per month for that period would give exactly $1900.00 as just measure of damages for the attachment of the roadhouse and adjacent property alone, leaving entirely out of consideration the usable value of the horses between the dates mentioned, during which the plaintiff was entirely deprived of their use. Now let us see the testimony of plaintiff on the question of the value of the horses (R. 57-58-59).

> "Q. What profits were being made off the horses, off each horse, at the time the attachment was made?
>
> A. Practically three dollars per day.
>
> Q. How long did that business continue?
>
> MR. RITCHIE. Before there are any more questions about the horses, I want him to tell what the horses were doing, who was handling them, and from what he derived compensation for those horses.
>
> MR. DIMOND. Answer that.
>
> THE WITNESS. I was handling them myself; they were doing a packing business to Chititu and Dan Creek.
>
> Q. What were you packing over?
>
> A. General freight and merchandise for Esterly and the Dan Creek Mining Company,

and different people over in that section of the country.

Q. How much did you charge a pound?

A. Seven cents, flat rate, to Esterly and the Dan Creek Mining Company.

Q. How much of a pack train were you running at that time?

A. I think I had eight horses.

Q. How many men did it take to handle them?

A. Myself, part of the time, once in a while, and Henderson.

A. How many men does it take to run a pack train of eight horses (54-37)?

A. Two men; one man can do it on a pinch.

Q. What is your average per pack horse over there?

A. 225 pounds.

Q. How long did it take to make a trip over to Chititu and Dan Creek and back?

A. She takes three days.

Q. In other words, every three days you take eight horses with 225 pounds each, that would be 2000 or 1800 pounds, rather, and you say you got for that seven cents per pound?

A. Yes, sir.

Q. That would be $126.00. Now, what is the wages of those two men, what is the ordinary rate of wages in there?

A. $100.00 per month. And, besides, we always pick up more or less packing coming back from the creeks that we usually get ten cents a pound for, bedding and blankets of the men and ferrying men across the river.

Q. The Nizina River has a ferry across it?

A. Yes, sir.

Q. Is it a bad river to ford?

A. Yes, sir.

Q. Did you have steady packing at the time the attachment was made?

A. Yes, sir; it was certainly steady packing; in fact the Marshal came to me and got my

permission and I gave my consent,—horses were so scarce and they were so hard up,—I hired the horses from the marshal, you might say, for $3.00 per day,—that is what I was to get clear of them, that money is in the hands of the Marshal at the present time.

Q. That was after the attachment?

A. That was after the attachment; the horses were so scarce and it had to be done before any arrangements could be made (55-58) with other parties to take the packing. Breedman has done the packing since, during those months.

Q. What months do you refer to?

A. August, September and October.

Q. All of October?

A. The biggest part of October.

Q. Up to the 20th, anyway?

A. Yes, up to the 20th, anyway."

Previous to the date of the attachment and during almost the entire spring and summer of the year 1914, J. A. Fagerberg had possession of the horses as bailee for hire at the rental of $2.00 per day. Five horses were attached. This would give a net return on them per month of $300.00. Now the plaintiff gave full and ample testimony as to the conditions in and around Blackburn at the time of the attachment and for the remainder of the summer and fall of 1914, and he stated that after the attachment was made horses were so scarce in the country, and the packing business was so great, that in order to relieve the congestion he consented that the Marshal let the horses out of his possession for the purpose of doing some packing for the Kennecott Company at $3.00 per day apiece (R. 59-61).

"Q. Did you have steady packing at the time the attachment was made?

A. Yes, sir; it was certainly steady packing; in fact the Marshal came to me and got my permission and I gave my consent,—horses were so scarce and they were so hard up,—I hired the horses from the Marshal, you might say, for $3.00 per day,—that is what I was to get clear of them; that money is in the hands of the Marshal at the present time (R. 59).

* * * * * *

COURT. What were these horses doing that they couldn't work the same as they did packing in the summer?

A. They were tied up in the hands of the Marshal.

Q. How did they become untied, so that they were able to do this packing?

A. There was a bond put up by Mr. Seagraves; Mr. Seagraves stood good for it, the Kennecott Mines Company.

Q. Where are the horses now?

A. They were sold (R. 61).

It appears without any contradiction from the testimony of the plaintiff, and without any objection to the introduction of the testimony on the part of the opposing counsel that there was steady packing to Chititu and Dan Creek at the time of the attachment, and that such business would have continued and did continue until the latter part of October, 1914. Calculating, then, for a run of three and one-half months of business, which is amply supported by the testimony, between August 6 and October 20, at $2.00 per day per horse, the price at which they were under bailment to J. A. Fagerberg, would amount to $750.00. But the plaintiff testified that he was making a profit of $3.00 per day per horse and that the business would have continued and did con-

time until October 20, and this testimony is supported by the fact that the horses were given by the Marshal to the Kennecott Mines Company at the same rate. The usable value of the horses at this rate for the time mentioned, that is, between August 6 and October 20, would give $1125.00, and this sum added to the rental value of the roadhouse and adjacent property which was valued at $1900.00, would make a total of $3025.00. This would not take into consideration in any manner the possible profits that the plaintiff could have made out of any other timber contracts whatsoever, other than the business contracted for and the reasonable value of the use of the roadhouse property for the period which it was detained from plaintiff under and on account of the attachment, at the same rate at which it had been previously rented for nearly two years. And it is not improbable that the Court in reducing the damages found by the jury in the sum of $4725.00 to $3000.00, had in mind the value of the horses and other property as shown by the testimony to which we have just called the Court's attention. They are as certain as any human thing can be; and aside from some extra ordinary calamities he would surely, as shown by the evidence, have made $3,000.00 out of the use of the property in question between the date of the attachment and the date of the judgment without taking into consideration the usable value of the horses after October 20, 1914.

We call the Court's attention to the paragraph quoted by counsel for the defendants of the case of

Williams vs. Island City, 37 Pac. 49, on page 42 of their brief. As it is set out fully there we shall not repeat it. But we submit that our evidence fully sustains the doctrine therein laid down. "The meas-" ure of damages is the average value of the use of " the business." Now, it is conclusively proved that the average value of the use of the roadhouse from November 1, 1912, until August 6, 1914, was $200.00 per month, and this is "ascertained and determined " by past experience." Under this doctrine, so far as the value of the use of the roadhouse is concerned, there can no doubt. Mr. Sedgwick says that the "evidence of actual past profits must be admissible." The past profits were $200.00 per month, and this would make $1900.00 for the period between the date of the attachment and the date of judgment, for the roadhouse alone, not reckoning the value of the horses. And with the horses the case is almost the same for the testimony shows that at the time of the attachment the plaintiff was clearing $3.00 per day on each horse (R. 57). And that there was sufficient business in sight to keep the horses working until October 20, 1914.

Counsel for the defendants show some amazement over the fact that the plaintiff and his brother made no money out of the business previous to the year 1914, since, as they claimed, there was considerable money to be made in that year, but we think this is sufficiently and clearly explained by the testimony of both that on account of the Chisana stampede there was a great rush of business, and the fol-

lowing from the testimony of the plaintiff under cross-examination (R. 124-125):

> "Q. If the freighting business is so profitable up there, how does it happen that you haven't anything more to show for all these years you have been working up there?
>
> A. As I say, this business is worked up. Put in this way, the business is getting to a point —we put in many years to work up that business to that point—it is getting to be where it is worth some money and capable of offering some money through the efforts of the past—that is sifting it down to a fine point. You can realize yourself that any business on the start has to be worked up to a certain point, before it is capable to earn that money."

And under the testimony there can be no question that the best business is in the late summer and fall, from and after the date of the attachment on August 6.

We have noted carefully, the cases cited to the Court on the proper measure of damages, and to one of which we have hereinabove adverted. As to the case of *Fidelity Company vs. Bucki Company*, 189 U. S. 135-142, we submit that it is not in point, as the Court held that the damages did not arise from the attachment alone, but rather from the cancellation of a contract with the Bucki Company and the bringing of suits against it. Neither is the case of *Cincinnati Gas Company vs. Western Siemens Company*, 152 U. S. 200, applicable, as a cursory examination of it will show, as the damages claimed there were on account of a breach of contract, as is the case with *Howard vs. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199-206. These

last two cases denied the admission of testimony as to profits prevented as a measure of damages, not alone on the ground that such damages under the testimony offered in each case was speculative but

> "(2) because such loss of profits is ordinarily remote, and not the direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms."

Howard vs. Stillwell & Bierce Mfg. Co., supra.

We submit that in the case at bar the profits prevented by the attachment were not remote, as they were the natural and necessary result of a total interruption of the business of the plaintiff; nor were they speculative as they were based on actual past profits shown for a long time preceding the date of the attachment, to the amount of $1900.00 in the case of the roadhouse, and packing business then known to be in hand for more than the balance of the $3000.00.

But the rigidity of the old rule as to profits prevented being not a proper measure of damages is gradually being broken down. The Courts now rather are inclined to believe that it is as well to put some of the burdens on the wrongdoer, and that where one person deliberately acts in violation of the law in attaching the goods of another and thus putting him out of business, the one who commits the wrong will not be permitted to escape liability on the ground that, inasmuch as the other person is out of business

and consequently is unable to state just what his profits would have been, therefore no damages whatever may be recovered. It is coming to be good law, —as well as equity,—in cases of this kind, not to permit the wrongdoer to escape all liability for his lawless acts because his victim, by reason of those very acts, is placed in a position where he cannot exactly show just how much he has been damaged.

A case absolutely and directly in point is:

Kyd, Sheriff, et al. vs. Cook, 76 N. W. 524;

an action against a sheriff on account of a wrongful attachment, wherein the appellee, Cook, was plaintiff and Kyd, defendant. It appeared that the plaintiff was conducting a furniture and undertaking business and the whole business was attached by the Sheriff under a writ against another. The business was closed for ten days, and all the goods in the amount of $6,000.00 were held for a period of three months. The Court expressly held that the loss of credit and the loss of profits was a fair measure of his damages, saying:

> "Another argument is that loss of credit was not a proper element of Cook's damages; that this element was too remote and speculative for consideration. This is simply saying that the wrongful destruction or injury of a merchant's credit is one for which the law affords no redress. We cannot subscribe to this doctrine. A man's financial standing or credit may not be 'property' within the technical meaning of that term, but it is something often more valuable; and, if it be wrongfully injured or destroyed by another, he may recover whatever pecuniary damages he can prove, by competent testimony,

under proper pleadings, he has sustained thereby.

Meyer vs. Fagan, 34 Neb. 185; 51 N. W. 753.
Lewis vs. Taylor (Tex. Civ. App.) 24 S. W. 92.
Hangen vs. Hachemeister (N. Y. App.) 21 N. E. 1046.
Haverly vs. Elliott, 39 Neb. 201, 57 N. W. 1010.

* * * * * * *

Another contention under this heading is that the District Court erred in admitting in evidence the proofs offered by Cook to show the loss of profits sustained by him in consequence of the attachment and removal of his goods, and the locking up of his store. The store was absolutely closed from the 23rd of October for ten days. The attached goods, comprising nearly all his stock, were held by the Sheriff from the time they were attached for some three months. The Court permitted Cook to show the amount of sales and the profits made by him in this business during the corresponding period of the previous year (that is, from October in one year until January of the next), as a basis for estimating his loss of profits; that by reason of the attachment of his goods, and the knowledge thereof that had been bruited abroad, he was unable to purchase goods on credit from persons with whom he had been previously dealing, in order to carry on the business. We think this testimony was all competent. It furnished a reasonably safe basis for determining whether Cook had been deprived of profits by this attachment proceeding, and the amount of such profits. The measure of Cook's damage was all the loss he had sustained as the result of this wrongful attachment. If the goods, when returned, were worth less than when they were seized, the amount of that depreciation was one element of damages. If Cook's reputation and credit as a merchant were injured by this wrongful attachment, this

injury was another element of his damages. If, by reason of the locking up of his store and the attachment of his goods, Cook's business was interrupted, and he was thereby deprived of profits which he would have made had the business not been interrupted, this loss of profits was another element of his damages; and, if the plaintiffs in error cannot be made to respond to Cook for all the damages wihch he sustained as the result of this wrongful attachment, it is not because of the fact that under the law Cook is not entitled to these damages, but because of the inability of the rule for their admeasurement.

Schile vs. Brokhahus, 80 N. Y. 614.
Goebel vs. Hough (Minn.) 2 N. W. 847.
Shepard vs. Gaslight Co. 15 Wis. 318.
Schars vs. Barnd, 27 Neb. 94, 42 N. W. 906.
Haverly vs. Elliott, 39 Neb. 201, 57 N. W. 1010.
Telegraph Co. vs. Wilhelm, 48 Neb. 910-67 N. W. 870.

"Counsel for plaintiffs in error criticize somewhat the doctrine of this Court making loss of profits in cases like the one at bar an element of damages. We think, however, the doctrine is a just and reasonable one, and one enforced by the courts generally. We think that a loss of profits is a result which may be reasonably, naturally and ordinarily expected to follow from the closing up of a merchant's place of business, and the seizure of his goods; and where an officer, holding a writ of attachment directed against A. and his property, closes up the place of business and seizes the goods in the possession of, and claimed to be owned by, B., when called upon to make good B.'s damages he ought not to complain because the Court includes in such damages the loss of profits sustained by B. because of the seizure of his goods and the interruption of his business."

Another well-considered case is that of *Welling-*

ton vs. Spencer, (Okl.) 132 Pac. 675, in which damages were claimed and recovered on account of a wrongful attachment, the Court saying:

> "The next question presented is whether the closing of the hotel building and consequent destruction of plaintiff's business was an element of damage to which he was entitled. The decisions upon this question are not uniform. A number of cases hold that no recovery can be had for loss of profits. However, not many late cases can be found supporting that proposition. A number of cases hold that no recoverey for loss of profits occasioned by the destruction of business can be had unless the act which occasioned the loss was malicious."

Kaufman vs. Armstrong, 74 Tex. 65, 11 S. W. 1048.
Bucki Lumber Co. vs. Maryland Fidelity Co., 109 Fed. 393, 48 O. C. A. 436.
Union Natl. Bank vs. Cross, 100 Wis. 174, 75 N. W. 992.
Braundorf vs. Fellner, 76 Wis. 1, 45 N. W. 95.

But a large number of well considered cases held that when the loss of profits is the approximate result of the unlawful act, and the amount is capable of proof to a reasonable certainty, the earnings of a business may be taken into consideration when assessing damages for the unlawful act.

Smith vs. Eubanks, 72 Ga. 280.
Stewart vs. Lanier House Co., 75 Ga. 582.
Chapman vs. Kirby, 49 Ill. 211.
Lawrence vs. Hagerman, 56 Ill. 68, 8 Am. Rep. 674.
Dobbins vs. Diquid, 65 Ill. 464.
Terra Haute vs. Hudnut, 112 Ind. 542, 13 N. E. 686.
Moore vs. Schultz, 31 Md. 418.
Lawson vs. Price, 45 Md. 123.

Evans vs. Murphy, 87 Md. 498, 40 Atl. 109.
Goebel vs. Hough, 26 Minn. 252, 2 N. W. 163.
See Sedgwick on Damages, 173 *et seq.*

* * * * *

In *Lambert vs. Haskell,* 80 Cal. 611, 22 Pac. 327, the Court said: 'It is objected that the respondent was allowed to recover damages for the profits which he would have made had he not been prevented by the injunction from carrying on his business. We think that this was proper. It must be true that where a party is wrongfully prevented by injunction from carrying on a profitable and established business he can recover damages therefor. And if the profits which he would have made are not to be allowed, what damages is he to recover? Would it be adequate compensation to reimburse him merely for his expenditures, and for the losses which he might sustain from being prevented from fulfilling existing engagements, and the depreciation of his stock in trade. If this were true, there would be a very convenient way of getting rid of a business rival. A business might be destroyed by a preliminary injunction before the truth of the allegations upon which it was obtained could be inquired into. The best considered cases agree, that, where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this question evidence of the profits which he was actually making is admissible.'

Terre Haute vs. Hudnut, 120 Ind. 550 *et seq.* (13 N. E. 686.)
Chapman vs. Kirby, 49 Ill. 219.
Simmons vs. Brown, 5 R. I. 299, 73 Am. Dec. 66.
Gibson vs. Fischer, 68 Iowa 30 (25 N. W. 914)
Goebel vs. Hough, 26 Minn. 256 (2 N. W. 163)
Shafer vs. Wilson, 44 Md. 268.

In the case of *Chapman vs. Kirby,* 49 Ill. 211,

the Court said: 'As to the estimate of losses sus-
"tained by the breaking up of his established busi-
"ness, there would seem to be no well founded objec-
"tion. We all know that in many, if not all, profes-
"sions and callings, years of effort, skill, and toil are
"necessary to establish a profitable business, and that
"when established it is worth more than capital. Can
"it be said that a party deprived of it has no remedy
"and can recover nothing for its loss, when produced
"by another? It has long been well recognized law
"that, when deprived of such business by slander,
"compensation for its loss may be recovered in this
"form of action. And why not for its loss by this
"more direct means? And of what does this loss con-
"sist, but the profits that would have been made had
"the act not been performed by appellants? And to
"measure such damages, the jury must have some ba-
"sis for an estimated, and what more reasonable than
"to take the profits for a reasonable period next pre-
"ceding the time when the injury was inflicted, leav-
"ing the other party to show that by depression in
"trade or other causes, they would have been less?
"Nor can we expect that in actions of this character,
"the precise extent of the damages can be shown by
"demonstration. But by this means they can be as-
"certained with a reasonable degree of certainty.'"

We thus see that only a *reasonable* certainty is required, and is not that absolute proof necessary to sustain many claims in law.

The same doctrine was laid down in the case of *Fort Smith & Western R. Co. vs. Williams*, 121 Pac.

275. This was a suit for damages arising out of breach of contract for the shipment of certain machinery, but the case is applicable for the reason that the Court held that the loss of profits in that case was the proximate result of the non-fulfillment of the contract by the defendant, and that on account of the notice the defendant had of the use to which the machinery was to be put, and the necessity of the contract being performed on time, such loss must have been contemplated in the contract, and thus eliminating the second and third of the reasons for denying the admission of the testimony of possible profits as a measure of damages as set forth in *Howard vs. Stillwell & Bierce Mfg. Co.*, 139 U. S., 199, hereinbefore quoted on page 51 of this brief. In this case the machinery was a merry-go-round to be used at a certain picnic which lasted two days. The defendant agreed to have the machinery on the ground in time for its erection and use during the whole period which the picnic lasted, naming specific dates. The outfit did not arrive until the expiration of the first day of the picnic and could not be erected until between 9:00 and 10:00 o'clock the following day and the last day of the picnic. The following quotation from the case (page 278) shows the nature of the evidence presented and considered sufficient for the court as a foundation for damages in the sum of $200.00.

> "The record further discloses that the number of people present on the first day was, if any difference, greater than on the second day. It showed, also, that the plaintiff, after getting his machinery ready for operation, at about ten

o'clock the second day, from about ten o'clock in the morning of the second day to the close of the evening of the same day, took in $245.00. The plaintiff claimed that he lost $400.00 by reason of not having his machinery ready as he agreed upon. He testified that he would have taken in $400.00 more had he had his machinery ready for operation during the whole of the two days. This testimony, of course, was a mere supposition, and not to be treated as a basis upon which to compute the amount of damages. But the fact that he took in $245.00 during a little more than two-thirds of the second day, and the witness Jorden, who operated the machine and who had been operating merry-go-rounds for seven years, testifying that the net profits of the time lost on the second day would have been at least $40.00, reckoning from what had been taken in during the remaining portion of the day, and the fact that the crowd was larger, if any difference, on the first day than on the second, it appears to be reasonable that under ordinary circumstances he would have taken in $200.00, the amount of the judgment, during the one and one-third days lost to him. The record shows there were 2,500 to 3,000 people present each day; that there was no other merry-go-round on the grounds; that a run lasted three to four minutes. This, it seems to us, would offer a reasonable basis upon which to estimate an approximate loss. It is not unreasonable to suppose that the receipts would have been approximately the same on the first as on the last day. Had he been able to run all of the second day at the same rates which he did run, his receipts would have been from $325.00 to $360.00. Hence we do not feel that it would be unreasonable for the jury to say from all the facts before them that defendant was damaged at least $200.00 for the one and one-third days lost. I would appear more unreasonable and conjectural and more out of harmony with business experience and common judgment to say

> that he would not. And in view of all the circumstances we think the verdict is not the result of mere guesswork or conjecture, but that it is fair, reasonable and should be allowed to stand. The judgment is therefore affirmed."

The following cases also are in point on the question of the admission of evidence as to profits prevented as a measure of damages:

Tootle vs. Kent, 73 Pac. 310,
and
West vs. Martin, 97 Pac. 1102.

In considering this phase of the case, then, it is necessary to take into consideration all of the circumstances surrounding the case: The situation of the property, the length of time the roadhouse had been operated, the Chisana stampede, the great rush of business at the time of the year at which the attachment was made and for several months thereafter, the fact that the plaintiff owned a saw-mill at which he had profitable use for the horses during winter, and even the permanent loss of business to the roadhouse on account of its being closed nine months and the transfer of the business usually done by it to another small town about one mile distant, as testified to by plaintiff, under cross-examination, to some extent (R. 125).

The fact that no profits were made out of the business previous to the year 1913, should not be a criterion by which to measure the profits possible to be made in the years 1913 and 1914. We suppose that if a merchant had operated a store and pack train at the mouth of the Klondyke River for ten years pre-

vious to 1897 he probably would not have made great profits, but in case all his property was wrongfully attached in the spring of 1898, with thousands of people pouring into the camp, and thousands of tons of freight to be taken in and horses worth almost their weight in gold, the fact that he had made no profits during the previous years ought not to be a bar to his recovery of damages by showing profits prevented by such a wrongful attachment. The same reasoning will apply to this case. Blackburn was constructed almost in a wilderness, and outside of the trade and travel superinduced by the construction of the railroad there would have been no business. The record shows that it was completed in the spring of 1911. It was rented in the fall of 1912 for $200.00 per month, and was under continuous lease at that figure almost until the date of the attachment. So far as the freighting business is concerned it too had to grow and was growing with the development of the country.

We shall revert briefly to the assignments of error (R. 440 *et seq.*) the first of which is:

> "The Court erred in admitting in evidence over the objection of defendants, Plaintiff's Exhibit "D", which purported to be a contract between Thomas Carstens and J. A. Fagerberg on the one part and H. M. Fagerberg on the part; it being conceded by plaintiff and by his witness, J. A. Fagerberg, that said contract was signed only by J. A. Fagerberg and H. M. Fagerberg, the name of Thomas Carstens being appended thereto by J. A. Fagerberg without his knowledge; the same purporting to be a contract for a partnership among said parties and ultimate in-

corporation."

That this was not error appears clearly from the instruction of the Court to the jury at the time Plaintiff's Exhibit "D" was admitted, as follows (R. 42):

> "BY THE COURT. At this time the jury will be instructed that the only purpose for which this exhibit "D" which has been introduced and read to the jury is admitted in evidence is to determine and relative to the question of ownership of this property as between J. A. Fagerberg and H. M. Fagerberg and so far as the name of Carstens appear in it, you will not consider that at all unless it further be shown by the evidence in this case that there was authority given by Mr. Carstens to enter into this agreement or to sign his name to any such paper; that so far as the recital in there that Carstens has entered into an agreement with J. A. Fagerberg is concerned, you will disregard that until it is shown by some competent evidence here that Mr. Carstens authorized such an arrangement. The only effect of this paper just read to you is, so far as it may aid you in determining whether J. A. Fagerberg or H. M. Fagerberg was the owner of this property."

The first paragraph of the second assignment of error relates to the admissibility of evidence as to what the defendants call speculative profits. This has already been covered. The second paragraph of the second assignment of error is predicated upon an untruth, for as we have before pointed out at the time of the attachment of the property sought to be recovered in this action the plaintiff was in possession of it and claiming it as his own, and we care nothing about the previous attachments of J. A. Fagerberg's property.

The third assignment of error is as follows:

"The Court erred in refusing to give part of instruction No. 5 asked by defendants as follows: "You are instructed that possession of property is presumptive evidence of ownership, until the basis of ownership is otherwise explained, and long continuance in possession strengthens the presumption of ownership. In this case if you find that the Blackburn roadhouse and equipment had been in possession of J. A. Fagerberg most of the time since it was constructed, and that H. M. Fagerberg never had charge of it for a considerable length of time you are entitled to consider the facts regarding possession as making a *prima facie* case of ownership in J. A. Fagerberg."

The instruction asked for has no application to the undisputed facts of the case, and the giving of the instruction could not have been in any manner helpful to the defendants. The plaintiff admits the ownership of J. A. Fagerberg in all of the property until July, 1913, which certainly is "most of the time" since the roadhouse was constructed. Besides it is contrary to the theory of partnership between the plaintiff and J. A. Fagerberg on which the case was tried. The asking for this instruction was a reversion by the defendants to their first amended answer wherein they stated that at the time of the attachment they knew of no alleged partnership between the plaintiff and J. A. Fagerberg.

The fourth assignment of error is based upon the Court's denying the defendant's motion for a new trial, and the fifth, upon the Court's entry of judgment in favor of the plaintiff and against the defendants. These matters have been covered in the pre-

ceding argument.

Now, as we have stated, the plaintiff in this action as well as the defendants submitted to the jury the question of the partnership under request for special findings thereon, and the jury found that there was no partnership between the plaintiff and J. A. Fagerberg. And the plaintiff insists that under the undisputed testimony in the case as to the manner of making the attachment, the defense of partnership never lawfully could have gone to the jury except for plaintiff's consent thereto. The jury found that the plaintiff was entitled to damages in the sum of $4725.00, but the Court, deeming this amount too high, reduced the sum to $3,000.00, stating that *"in "the opinion of the Court the sum of three thousand "dollars would be just and equitable as damages."*

The Court and the jury heard all the evidence, viewed the witnesses on the stand, and were better able than this Court to judge the truthfulness of their testimony. And we shall not cite any authority to the Court to sustain the proposition that the findings of Courts and juries that try cases and hear all the testimony are not lightly set aside, even though the Appellate Court might come to a different conclusion from the same testimony. And this case, we submit, is entirely a question of fact. Counsel for the defendants cannot point to an error of law during the trial which would for an instant commend itself to the mind of this Court. The question of partnership was passed upon by the jury and found in favor of the plaintiff. The question of damages was

passed upon by both the jury and the Court, and found in favor of plaintiff in the sum of $3000.00. The plaintiff has had no more than justice, and the judgment should stand.

Respectfully submitted,

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Attorneys for Defendant in Error.